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In The Supreme Court of the United States

NORTH JERSEY MEDIA GROUP INC.
and NEW JERSEY LAW JOURNAL,

Petitioners,

v.

JOHN ASHCROFT, Attorney General of the United States, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The government acknowledges (at 5) that there have already been more than 600 individuals subjected to secret hearings. That hundreds of individuals have been deprived of their liberty in secret, closed-door hearings in the United States has understandably generated enormous public attention and concern.

Notwithstanding the exceptional nature of this case, the government argues that review is not warranted because (1) the conflict with the Sixth Circuit's decision in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), is inconsequential, (2) there are only a handful of "special interest" detainees remaining and the Creppy policy is currently under review, and (3) the decision below was correct. None of these reasons has any force.

1. The government acknowledges that the "Third and Sixth Circuits have issued divergent opinions," but contends that the conflict is "not sufficiently pressing or mature" because the Sixth Circuit decision "pertained" to only one alien's removal proceedings and those proceedings are now complete. Gov't Br. at 9, 10, 12. The government's contention is unpersuasive. Although the preliminary injunction in the Sixth Circuit directly applies to one alien's removal proceedings (Haddad), the court's *analysis* focused on the Creppy directive in general and is plainly applicable to all special interest cases in that circuit. *See, e.g.*, *Detroit Free Press*, 303 F.3d at 710 (finding Creppy directive "under-inclusive" and "over-inclusive"); *id.* at 707 (stating that "Creepy directive fails" requirement that closure occur upon "specific findings"). Indeed, in its *en banc* petition in the Sixth Circuit, the government itself stated that the decision's "rationale" was exceedingly "broad" and that both the "holding" *and*

"analysis" were squarely in conflict with the Third Circuit's decision. Gov't Reh'g Pet. at 1.

In short, the Sixth Circuit's analysis and holding clearly do not apply only to Haddad's removal proceedings; if the government seeks to close future proceedings in the Sixth Circuit, it will have to do so on a hearing-by-hearing basis, and may not rely on the Creppy directive. That stands in sharp contrast to the rule in the Third Circuit, where the government may continue to subject immigrants to secret, closed-door hearings, free of all public scrutiny. Where interests of this magnitude are at stake, the Court should not permit the government to operate under different standards depending on where in the country it happens to detain an individual – especially given the lack of any meaningful constraints on the government's ability to transfer special interest detainees to facilities within the Third Circuit.

2. The government appears implicitly to recognize that there is a genuine conflict between the Sixth and Third Circuits. The government thus argues that review should be denied because there are only four "special interest" detainees remaining in the country (only one of whom realistically faces future proceedings), and because the policy at issue here is under review and *might* change. Gov't Br. at 12 n.5, 13-14. Neither of those reasons is persuasive under the circumstances of this case.

a. The fact that there are currently only a few special interest detainees remaining is not a sufficient basis on which to oppose review because the Creppy policy remains in force and can be used at any time – an option the government does not foreclose. Thus, as an initial matter, the case plainly is not moot. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (lead

plurality opinion); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) (*Press-Enterprise II*). Beyond that, however, the practical need for this Court's review remains compelling. If certiorari were denied, the government could again conduct hundreds of secret proceedings before the issue returned to this Court. Indeed, according to the Justice Department's own figures, it detained hundreds of individuals in the span of just seven weeks after September 11. *See* Dan Eggen and Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, Washington Post, Nov. 6, 2001. Thus, even assuming that future challenges were expedited by the courts, the practical effect of denying review at this time is potentially enormous.

Moreover, this is hardly the ordinary case in which the newspapers could bring a challenge any time the government again decides to invoke the Creppy directive. As noted in the Petition (at 5-6), the Creppy directive prohibits *all* public information about special interest cases. In fact, the government initially did not even disclose the existence of the Creppy policy itself, and it was some time before the public and press learned that the government had a policy of conducting closed-door hearings in this country. *See* William Glaberson, *Secret Trials; Closed Immigration Hearings Criticized as Prejudicial*, New York Times, Dec. 7, 2001. Consequently, as was true this time, it may be months before the public and press learn that the Creppy directive is being applied, if indeed they ever learn. Thus, denying review would raise more than just the prospect that the government could conduct hundreds more secret proceedings before another challenge could reach this Court. The very secrecy with which the government is operating makes it uncertain that such a challenge could ever be brought. At a minimum, it seems likely that the newspapers would be in the

same position petitioners are now, with the government having completed the bulk of its secret hearings before this Court could address the issue.

b. The government also notes that its policies are currently under "review." Gov't Br. at 10, 13-14. Yet, the government states only that some revision is "likely." *Id.* at 13. It does not give any guarantee that such revisions will occur or that such revisions will eliminate the blanket closure policy or special interest category. In fact, the government states only that it is currently "reviewing the *process* for designating individuals as special interest aliens," not that it is considering eliminating that category, much less eliminating the mandatory closure of such cases. *Id.* (emphasis added).

If the government ultimately chooses to revise its current policy in a meaningful way, it can inform the Court of the actual changes and the Court could then decide whether to dismiss the case. But, with a case of this magnitude, the Court should not deny certiorari based on the government's vague assurance that it *may* revise its policies at some undisclosed future time and that those revisions *may* alter the legal framework. That would leave a direct circuit conflict in place and allow the government to continue to conduct secret hearings anywhere within the Third Circuit.

3. The government further argues (at 14-20) that review is not warranted because the Third Circuit's decision was correct. The newspapers addressed the merits in their Petition (at 24-29), and make only the following additional points.

a. The government asserts (at 15) that "numerous Executive agencies have regulations that provide for non-public hearings – including, for example, under the vast

Social Security program." But, the newspapers have not argued that all agency hearings must be open. The deportation process involves formal, trial-type adjudicatory proceedings in which the government has undertaken coercive enforcement action to deprive an individual of liberty. *See generally* 8 U.S.C. 1229a (1999 & West Supp. 2003); 8 C.F.R. 1240.1-1240.16 (2003). Deportation proceedings are thus readily distinguishable from most, if not all, other Executive agency hearings. That is particularly true with respect to social security proceedings, which this Court has noted are conducted in an "informal, nonadversary manner;" indeed, the Court has observed that social security hearings are "perhaps the best example" of an agency proceeding that is *not* based on the "judicial model." *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (citations and internal quotation marks omitted); *see also id.* at 110 ("The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings").

b. The government vastly understates the tradition of openness in the deportation process. Contrary to the government's contention (at 15-16), the access regulations that have been in place since 1964 do not support the Third Circuit's decision. The regulations pointedly state that proceedings "shall be open" and then provide for certain narrow exceptions to open deportation proceedings. Moreover, of these exceptions, only child abuse cases are mandatorily closed. *See* App. 104a-105a. Even in the criminal context, there are exceptions to the tradition of openness. *See Globe Newspaper, Inc. v. Superior Court*, 457 U.S. 596, 612 (1982) (Burger, C.J., dissenting) (noting exceptions).

Furthermore, the government ignores the fact that access to deportation hearings did not begin with the 1964 regulations. Unlike exclusion proceedings, neither Congress nor the governing agencies have ever enacted a provision closing the deportation process. App. 26a-28a. The press and public thus attended deportation proceedings long before enactment of the 1964 regulations made the right of public access explicit. *See, e.g., Matter of M___*, 5 I. & N. Dec. 261, 262 (BIA 1953) (noting that "members of the press were permitted to be present during the hearing" and denying alien's claim that adverse newspaper publicity made the hearing unfair); Alexander Feinberg, *U.S. Charges Santo with Communism at Tense Hearing*, New York Times, Sept. 12, 1947 ("fifty [union] men and women were admitted" to the hearing); *Union Head Was Communist, He Admits at Alien Hearing*, New York Times, Nov. 2, 1947 (hearing "attended by 100 persons"); *Smith Again Silent At Hearing By U.S.; Officer of the NMU Refuses to Defend Himself Against Charge of Communism*, New York Times, Apr. 9, 1948 (open hearing of alleged alien Communist); *Clash Marks Hearing on Doyle As Alien*, New York Times, Mar. 26, 1948 (same); *Joe Adonis Goes on Trial in Jail*, New York Times, Apr. 28, 1953 (deportation hearing inside prison of alleged mafia member was "attended also by three newspaper reporters"); *Belfrage is Silent on Red Affiliation*, New York Times, Aug. 11, 1954 ("public hearing in a deportation proceeding"). *See generally Martens' Hearing Doors are Closed*, Washington Post, Apr. 1, 1920 (noting deportation hearing of Soviet representative was closed, but that "[s]uch hearings usually are open").

The government also ignores the larger context and traditions surrounding the government's use of its coercive power to deprive individuals of liberty. By the mid-1600s,

it was already the case in England that there were few, if any, instances where a formal adjudicatory proceeding would be closed where the proceeding involved the use of the government's enforcement powers to deprive an individual of liberty.[1] Indeed, the story of Anglo-American law is in no small part the story of rebellion against summary and secret proceedings to deprive an individual of liberty. *In re Oliver*, 333 U.S. 257, 268-71 (1948).

c. The government makes much of the notion that the courts generally must defer to the political branches on immigration policy. Gov't Br. at 17-19. But it is the very fact that the courts will not question the wisdom of substantive immigration policy that makes public access to the deportation process absolutely essential. Where the political process is the only meaningful institutional check on a process that so profoundly affects the lives of so many people, the public must be able to see for itself how the immigration laws are being implemented in order to make "informed" judgments about the process. *Globe Newspaper*, 457 U.S. at 605.

Relatedly, the government contends (at 19) that a right of access should not be recognized because often the only issue at a deportation hearing may be whether to award the alien "discretionary" relief from deportation.

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[1] *See, e.g.*, Act of 1662, 14 Car. II, c.12, §§ 1-2 (removal of transient poor from local parishes to their place of settlement in open quarter sessions); *id.* § 6 (determination in open quarter sessions whether beggars, the idle poor, and others were "fitt to be transported to the English Plantations [beyond the seas]" as indentured servants); Sir Thomas Skyrme, *History of the Justices of the Peace* 202 (2d ed. 1994) (by early 1600s quarter sessions "had become the hub of county affairs around which the whole community revolved" and "were attended by everyone").

Yet, it is precisely because immigration judges do exercise such enormous discretionary power over the lives of individuals that public scrutiny is so critical. The decision to grant or deny discretionary relief literally determines the fate of thousands of immigrants each year, many of whom may be long-term residents of this country who have lived here all their lives and whose spouses and children are U.S. citizens. *See INS v. St. Cyr*, 533 U.S. 289, 295-96 (2001). If denied relief, these individuals and their families will face profound choices, including whether to separate as a family so that the children may remain in the United States to realize a better life. The government takes pains to emphasize that no immigrant has an absolute right to such discretionary relief. That is indeed true, and it means that the decision to deny relief will be largely unreviewable in the courts. But that only increases the importance of public scrutiny as the principal check on the "integrity" of the process. *Richmond Newspapers*, 448 U.S. at 578 (lead plurality opinion); *Globe Newspaper*, 457 U.S. at 606 (public scrutiny "enhances the quality and safeguards the integrity" of the process); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*) (same).

Moreover, it is not simply that access enhances the fairness of the process. Access ensures the "appearance of fairness." *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. at 508); *Globe Newspaper*, 457 U.S. at 606 (same). The legitimacy of any system of law ultimately depends on the public's confidence in the fairness of that system. But, as this Court has stressed, public confidence cannot be sustained, and will quickly erode, where justice is administered behind closed doors. *See Press-Enterprise I*, 464 U.S. at 508. This recognition that

legal tribunals must not only do justice, but also display justice, carries special force in the deportation context.

Throughout the country's history, successive generations of immigrants from every part of the world have settled here, creating communities of legal residents and first-generation citizens. Today, few areas of the country contain more of these communities than the regions in which petitioners' papers are published and read. These communities believe deeply in the rule of law; indeed, for these communities it is often the rule of law that separates the United States from the countries they left behind. As a result, they accept the deportation process and the hardship it brings. But that faith cannot endure if the process is shielded from public view.

d. Finally, the government contends that, even assuming there is a right of access, the Creppy directive's blanket closure policy can survive First Amendment scrutiny because the traditional case-by-case closure approach will undermine national security. As we explained in the Petition (at 6-9), the directive is both over- and under-inclusive. The government's brief only reinforces that point. The government acknowledges (at 11) that in the Sixth Circuit it chose not to seek a stay from this Court or to close all of Haddad's future hearings, even though the government's legal position is that every minute of every hearing must be closed. The government offers no explanation for its actions, other than to state indirectly that Haddad's "identity and background had already been widely disseminated in the press." Gov't Br. at 12. Yet, that is the point. There invariably will be cases where it is unnecessary to close the proceedings in their entirety. That is why this Court has insisted on case-specific findings before it will sanction closure. *Globe*

Newspaper, 457 U.S. at 608-09 (invalidating mandatory, blanket closure rule).

* * *

For the reasons stated above, and in the Petition, the newspapers respectfully request that the Court grant the Petition for Certiorari.

Respectfully submitted,

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